STATE OF MICHIGAN

COURT OF APPEALS

THE ESTATE OF ROSETTA MCNAB, Deceased, by ROSHELL D. MCNAB, Personal Representative, Plaintiff-Appellant,	UNPUBLISHED March 6, 2003
v	No. 232715 Wayne Circuit Court
HENRY FORD HOSPITAL, a/k/a HENRY FORD HEALTH SYSTEM, Defendant-Appellee.	LC No. 00-031579-NH

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant summary disposition based on the statute of limitations and denying plaintiff's motion to amend her complaint. We affirm.

Plaintiff alleged in the complaint that defendant's doctor committed malpractice by failing to obtain plaintiff's decedent's medical history when he treated her for a sinus infection in August 1995 and by failing to inform the decedent that she should return for a complete physical examination approximately a year later, in August 1996. Because the doctor allegedly did not obtain a medical history from the decedent when treating her, he apparently was unaware that she had previously been treated for nasal cancer. According to plaintiff's complaint, the decedent was later diagnosed with cancer in other parts of her body that originated from a recurrence of the nasal cancer. The complaint alleged that if defendant's doctor had followed the standard of care, the "[e]arlier diagnosis and treatment would have averted [the decedent's] death on May 5, 1998."

The trial court ruled that the two-year statute of limitations for medical malpractice claims barred plaintiff's lawsuit because she filed her complaint on September 26, 2000, more than two years after August 1995. Plaintiff contends that the statute of limitations did not bar her lawsuit because "[t]he first act of malpractice in this case" occurred in August 1996, when defendant's doctor did not "send notice that [the decedent] needed to schedule a complete

physical examination in the internal medicine clinic."[1] Plaintiff contends that the period of limitation ran until August 1998 and that because the decedent died before the expiration of this period, plaintiff had two years after being appointed personal representative to file the complaint. See MCL 600.5852. Plaintiff contends that she therefore filed the complaint in a timely manner. We disagree.

This Court reviews de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition under MCR 2.116(C)(7).

> In deciding a motion made under MCR 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. *Rheaume* [*v Vandenberg*, 232 Mich App 417, 421; 591 NW2d 331 (1998)] . . . . If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Asher v Exxon Co, USA*, 200 Mich App 635, 638; 504 NW2d 728 (1993). [*Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 706; 620 NW2d 319 (2000).]

A cause of action involving medical malpractice accrues "'at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.'" *Taylor v Kurapati*, 236 Mich App 315, 358; 600 NW2d 670 (1999), quoting MCL 600.5838a(1).

Despite plaintiff's arguments to the contrary, the complaint simply does not allege a separate and actionable act of malpractice in August 1996 that served to extend the period of limitation. The actionable omission in failing to treat properly the decedent's condition occurred at the time of the original visit in August 1995, when the doctor allegedly failed to obtain a medical history from the decedent. Moreover, even assuming, arguendo, that the cause of action accrued in August 1996, dismissal would nonetheless have been appropriate because the affidavit of merit, required by statute to commence a medical malpractice lawsuit, see MCL 600.2912d(1), focused on the August 1995 visit and did not include an allegation about the failure to send a reminder notice to schedule a physical examination in August 1996.[2]

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[1] Plaintiff contends in her appellate brief that

> [w]hen a patient presents for care and chooses a new doctor, it is incumbent upon that doctor to obtain a complete history and physical examination. Otherwise, the patient is lost for medical follow-up. In this case, if [the doctor] and the clinic had followed the standard of practice, a follow-up reminder notice would have gone out in 1996. [The decedent] would have scheduled an appointment for a complete physical examination. A history of the nasal carcinoma would have been obtained at that time.

[2] Additionally, even assuming, once again, that the cause of action accrued in August 1996, plaintiff would have two years from her appointment as personal representative to file the (continued…)

Plaintiff also contends that the trial court should have allowed her to amend her complaint to add an allegation of negligence with regard to a medical visit in June 1997. Plaintiff contends that defendant's doctors should have immediately performed a biopsy in June 1997 instead of two months later. She alleges that the court "should have considered and allowed [the] amendment as the failure in June [1997] arose out of the same transaction or occurrence as that in 1996." However, even assuming under *Doyle v Hutzel Hosp*, 241 Mich App 206, 219-220; 615 NW2d 759 (2000), that the amendment was allowable because the events in question related to the "same transactional setting," the amendment would nonetheless be futile because the original complaint was *barred by the statute of limitations*. Accordingly, the trial court did not abuse its discretion in denying the motion to amend. See *id.* at 211-212 (setting forth standard of review).

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter

(…continued)

complaint. Her appointment occurred on May 27, 1998. Therefore, the period of limitation expired on May 27, 2000, with a possible extension of 182 days under MCL 600.2912b for providing a notice of intent to sue. See *Morrison v Dickinson*, 217 Mich App 308, 312-313; 551 NW2d 449 (1996). Plaintiff contends that she is entitled to the 182-day extension because she provided a notice of intent to sue on April 14, 2000. However, the 182-day extension was available only if the notice of intent to sue complied with the statutory requirements. See *Rheaume, supra* at 423-424. One of the statutory requirements is that the notice contain "[t]he factual basis for the claim" and the manner in which the claimed breach of the standard of care occurred. See MCL 600.2912b(4). The notice of intent as represented by defendant did not include an allegation about the failure to send a reminder notice to schedule a physical examination in August 1996. Accordingly, it is possible that no tolling under MCL 600.2912b occurred and that plaintiff's complaint was untimely for this additional reason. However, because the notice of intent to sue is not included in the lower court record filed with this Court but is instead attached to defendant's appellate brief, we do not rest our decision on this basis.